IN THE

Supreme Court of the United States

MICHAEL RODAK,

OCTOBER TERM, 1973.

No. 73-466

WILLIAM E. ARNOLD COMPANY,
A FLORIDA CORPORATION,

Petitioner,

VS.

CARPENTERS DISTRICT COUNCIL OF JACKSONVILLE AND VICINITY, A LABOR ORGANIZATION, AND AS AN UNINCORPORATED ASSOCIATION, BY AND THROUGH JOHN H. SEA, BUSINESS REPRESENTATIVE THEREOF; AND CARPENTERS LOCAL UNION NO. 627, A LABOR ORGANIZATION, AND AS AN UNINCORPORATED ASSOCIATION, BY AND THROUGH EARL S. HUFF, ASSISTANT BUSINESS REPRESENTATIVE THEREOF,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONERS.

MILTON SMITH,
General Counsel,
RICHARD BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.
Washington, D. C.

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
JERRY KRONENBERG,
JULIAN D. SCHREIBER,
Borovsky, Ehrlich & Kronenberg,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.

Of Counsel:
COLE, ZYLSTRA & RAYWID,
2011 Eye Street, N. W.,
Washington, D. C. 20006.

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INTEREST OF THE AMICUS CURIAE.*

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.**

3. The questions presented in the instant case are matters of continuing importance to the Chamber. The question raised by the parties is whether a state court has jurisdiction in a suit under Section 301 of the Labor-Management Relations Act (29 U. S. C. 185) to enjoin a work stoppage which constitutes not only a violation of the contractual duty not to strike but also is arguably an unfair labor practice. The court

* Consents of all parties to the Chamber's participation have been filed with this Court.

** *E.g., Gateway Coal Company* v. *United Mineworkers of America, et al.*, ... U. S. .... (Jan. 1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkle, et al.* (Supreme Court), No. 72-1554; *Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife* v. *Charles Odegaard, President of the University of Washington, et al.* (Supreme Court), No. 73-235; *N. L. R. B.* v. *Bell Aerospace Company Division of Textron, Inc.* (Supreme Court), No. 72-1598. *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952 (1973); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 517 (1971).

below refused to grant injunctive relief until the National Labor Relations Board first determined if the activity was prohibited or protected by the Labor-Management Relations Act. This question is of particular concern to the Chamber and its members since any rule which may emerge will necessarily exert a substantial impact on the ability of these members to enforce a no strike pledge contained in a collective bargaining agreement and to obtain prompt injunctive relief to curtail work stoppages which violate this pledge. The rule articulated by the court below and urged here by the unions will, if adopted, have deleterious ramifications for employers when they look to the courts for expeditious enforcement of no strike commitments. Since virtually every action to enforce no strike commitments will involve the issue of whether the strike is arguably protected or prohibited by the Labor-Management Relations Act (herein also called the Act), if the decision of the court below is adopted, courts will be required to cede their jurisdiction to the National Labor Relations Board with its attendant and unavoidable procedural delays. As a consequence, employers will be deprived of a judicial forum for the expeditious enforcement of no strike commitments. It is the availability of such a forum that is the principal incentive to employers to agree to submit labor disputes to the grievance or arbitral process. The Chamber is, thus, vitally concerned that the question here be properly resolved.

4. There are other questions at least implicitly raised by this case whose answers will have significant impact on labor policy. This Court has an opportunity to reevaluate whether the policy underlying *Garmon*[1] is sound in light of judicial experience and to consider whether this policy should continue, without qualification, to be applied. The amicus urges this Court to consider these questions when deciding this case. Furthermore, just as this Court recognized that a presumption

1. *San Diego Building Trades Council* v. *Garmon*, 395 U. S. 236 (1959).

of arbitrability is necessary to foster the nation's labor policy, so also for the same reason this Court should acknowledge a presumption that arbitration provisions were intended to be final and binding, if this intent is not discernible from their terms. This presumption of finality will preclude lawful strikes over arbitrable disagreements for as long as these arbitration provisions remain in effect. Finally, the amicus urges that this Court find that, an agreement containing a mandatory grievance procedure, which stops short of arbitration, nonetheless requires that no work stoppages occur over disputes required to be submitted to this procedure until this procedure has been exhausted.

Because of its broad representation of employers, the Chamber is in a position to present arguments to the Court which might not otherwise be advanced by the parties.

SUMMARY OF THE ARGUMENT.

This Court has consistently emphasized that the congressional policy favoring the peaceful settlement of industrial disputes is preeminent. To aid in the implementation of this policy, this Court has enunciated its presumption of arbitrability and has held that where a contract imposes upon both parties the duty of submitting grievances to final and binding arbitration, a no strike commitment must be implied with respect to these grievances. To still further the national labor policy this Court should find that there exists a legal presumption that contractual arbitration provisions are final and binding and that work stoppages over arbitrable matters may not legally occur as long as the arbitration provisions remain in effect. In addition, for the same policy considerations, labor organizations must not be permitted lawfully to strike over disputes covered by mandatory grievance procedures, which do not culminate in arbitration, until they fully exhaust these procedures.

Though the policy favoring the arbitration process conflicts in this case with the policy promoting decisional uniformity, as articulated in *Garmon, supra,* the former policy must prevail if the nation's labor policy is to be fostered. Indeed, the policy underlying the preemption doctrine is ripe for reexamination in light of judicial and administrative experience.

ARGUMENT.

A. THIS COURT'S DECISIONS HAVE CONSISTENTLY EMPHASIZED THE CONGRESSIONAL POLICY TO PROMOTE PEACEFUL SETTLEMENT OF INDUSTRIAL DISAGREEMENTS THROUGH ARBITRATION.

1. This Court's Construction of Arbitration and No Strike Commitments Has Been Consistent with the Goal of Fostering Industrial Peace by the Arbitral Process.

The desideratum of the nation's labor policy is to secure collective bargaining agreements by encouraging the contracting parties to eschew work stoppages or lockouts and instead settle their disagreements by the peaceful arbitral process.[2]

This Court has recognized that employers would be reluctant to bind themselves to the obligations of arbitration unless the union entered into a correlative commitment to abstain from work stoppages. Accordingly, to foster the policy encouraging arbitration, this Court has held that a contractual agreement to submit disagreements to final and binding arbitration gives rise to an obligation not to strike over these disputes. The commitment to arbitrate and the duty to refrain from work stoppages are construed as applying coextensively, whether the no strike pledge is expressed in the agreement or implied, absent an unequivocal statement expressing contrary intent contained in the contract.[3] To further stimulate the execution and utilization of arbitration provisions, this Court concluded that Section

2. The national labor policy favoring arbitration has been edicted by Congress. Section 203(d) of the Act (29 U. S. C. Section 173(d)) in part states:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

3. In this Court's words: "Absent an explicit expression of [a contrary] intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous

301(a)[4] empowers federal courts to enjoin violations of a contractual pledge not to strike and, in addition, confirmed that state courts possessed identical powers.[5]

In order to foster maximum utilization of the arbitral process, and thereby to implement Congressional policy, this Court also ruled that under the usual arbitration provisions, every disagreement is arbitrable and, therefore, must not be the cause of a work stoppage, unless the terms of the collective contract unambiguously indicate that a particular matter is to be excluded from coverage under these provisions.[6]

Enunciating this presumption of arbitrability, this Court recognized that a collective agreement cannot comprehend in its terms the manifold situations that will arise during the relationship between the parties, and that the parties, in fact, bargained for the resolution of these unforeseen disagreements by an arbitrator rather than by economic warfare.

As a consequence of the foregoing principles, where an issue exists over whether a particular disagreement is arbitrable, an employer is entitled to secure immediate injunctive relief to halt a work stoppage over this disagreement, even in the absence

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application." *Gateway Coal Company* v. *United Mineworkers of America, et al.*, ... U. S. .... (Jan. 1974). 85 LRRM 2049, 2055.

4. Section 301, Labor-Management Relations Act, 29 U. S. C. Section 185.

5. *Boys Market, Inc.* v. *Retail Clerks' Union, Local 770*, 398 U. S. 235 (1970).

6. According to this Court:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the backdoor of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator." *United Mineworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, at 584-5 (1960).

of an express contractual no strike commitment.[7] The disagreement whose arbitrability is at issue must be presumed to be arbitrable and there is a duty not to strike over such arbitrable disagreements.[8]

2. In Order to Further the Policy of Industrial Peace Through Arbitration, This Court Should Find That There Exists a Presumption That Arbitral Procedures Are Final and Binding and That Lawful Strikes Over Arbitrable Disputes May Not Occur as Long as the Arbitration Provisions Remain in Effect.

This Court should presume that the parties contemplated that their arbitral procedure will culminate in a decision which will be final and binding, where that intent is unclear from the terms of the collective bargaining agreement, unless the agreement discloses indisputably that the arbitration provisions are not susceptible to that interpretation.[9] This presumption, like the presumption of arbitrability, will promote the peaceful settlement of labor disputes and is consonant with the intent of the parties. Their likely objective, in utilizing their arbitral procedures, is to further their common goal of unimpeded production free from the exacerbations of work stoppages. A no strike pledge is coextensive with an agreement to arbitrate. Where an arbitration procedure terminates in a binding decision, whether by its express terms or by legal presumption, there can be no legitimate work stoppages over arbitrable disagreements as long

7. *Gateway Coal Company* v. *United Mineworkers of America, supra.*

8. Only explicit contractual language stating that the no strike obligation will not be coextensive with the agreement to arbitrate can deprive the employer of his right to this injunctive relief. *Gateway Coal Company* v. *United Mineworkers of America, supra.*

9. The Chamber refers only to "grievance" arbitration, concerning disputes that arise from the contracts' interpretation. The Chamber is not referring to "interest" arbitration, that is, arbitration which is aimed at securing an agreement rather than construing an agreement which already exists and as to whose terms some dispute has arisen.

as the arbitration provisions remain in effect. The decision of the arbitrator is the terminal of the process to resolve disagreements. On the other hand, if the arbitral procedure is found not to produce a binding result, work stoppages can occur with impunity after the parties have fulfilled their contractual commitment to arbitrate; the agreement to refrain from striking will likely last only as long as the parties are involved in the arbitral process. Consequently, the Chamber urges this Court to hold that arbitration procedures will be presumed to culminate in final and binding decisions where they are ambiguous in this respect, unless there exists an express contractual statement manifesting a contrary intent. This holding would assure parties that arbitration commitments will be honored, as long as they remain in effect, as the exclusive means to settle arbitrable disputes, despite any ambiguities that may exist in the terms of these commitments.

3. This Court Should Find That a Union May Not Lawfully Strike Over a Dispute Covered by a Mandatory Grievance Procedure That Does Not Culminate in Arbitration Until It Fully Exhausts This Procedure.

In addition to its arguments heretofore advanced, the Chamber believes that the holding in *Boys Market, supra,* should, if necessary, be expanded to allow employers to enforce broad contractual no strike provisions and to obtain injunctive relief not only when the contract expressly or presumptively provides for binding arbitration, but also when the union is required to invoke a grievance procedure that stops short of binding arbitration. That is, where a union is required by the contract to submit an issue in dispute to a grievance procedure which stops short of binding arbitration, but instead, elects to strike, an injunction against the strike could be acquired and maintained at least until the grievance process was exhausted. Such an interpretation of the no strike-grievance terms is in complete harmony with the parties' intent to forego self-help in primary or sympathetic dis-

putes until the mandatory grievance procedure designed to settle these disputes was fully utilized. In achieving a contract with a broad no strike commitment an employer necessarily provides the union with the quid pro quo of a mandatory grievance procedure and likely with numerous other benefits. In return the employer has attempted to secure labor peace during the contract's term, with the union retaining its right to strike only after it exhausts the mandatory provisions of the grievance procedure. The employer should, therefore, be insulated from all other strikes, including sympathetic strikes when, for example, his employees refuse to cross a picket line established at his plant by another bargaining unit. Since the employees who refuse to cross the picket line have no grievance and have not exhausted the grievance procedure, the employer, if the collective bargaining process is to be respected, must be able to secure prompt equitable relief to halt their work stoppage. See, *Monongohela Power Co.* v. *I. B. E. W., Local 2332*, 484 F. 2d 1209 (CA 4, 1973).

Furthermore, grievance negotiations involving face-to-face confrontations at various union-management levels contribute as much to the voluntary and peaceful settlement of labor disputes as does arbitration; the parties appeal to arbitration only after prior voluntary efforts have failed. Therefore, to require a union to refrain from striking until it fully exhausts the grievance procedure is in complete harmony with the national policy favoring voluntary adjustment of labor disputes, even where the grievance procedure does not provide for binding arbitration. See, *American Airlines* v. *Airline Pilots' Association*, 169 F. Supp. 777 (S. D. N. Y. 1958). There, in an analogous situation, a strike was enjoined pending exhaustion of the mandatory procedures provided by the Railway Labor Act for settlement of labor disputes. These procedures did not require submission of the dispute to final arbitration. Both the statutory procedures and the negotiated but mandatory grievance mechanisms are reflections of the Congressional policy to encourage the orderly settlement of labor disputes. Thus, similar to situations involving these

statutory procedures, the union should be required to exhaust the negotiated grievance procedures before resorting to work stoppages in the face of a broad no strike clause.[10]

This Court's emphasis on the policy of securing labor peace through the utilization of the peaceful arbitral process is apparent from the decisions referred to in this section. In this proceeding, however, the policy favoring arbitration has come into conflict with the policy promoting decisional uniformity as expressed in this Court's *Garmon* decision. The amicus turns to a consideration of which of these policies should prevail.

B. THE POLICY FAVORING PEACEFUL SETTLEMENTS OF INDUSTRIAL DISPUTES THROUGH ARBITRATION HAS GREATER NATIONAL SIGNIFICANCE THAN AND MUST PREVAIL OVER THE POLICY OF PREEMPTION.

1. Courts Must Be Permitted in Suits Under Section 301 to Enjoin Work Stoppages Which Violate No Strike Commitments Notwithstanding That Issues Raised by These Strikes May Also Come Within the N. L. R. B.'s Jurisdiction.

Here the union struck because of a jurisdictional dispute, thereby breaching their no strike commitment and at least arguably violating Section 8(b)4 of the Act. Thus, there exists an overlapping between the traditional jurisdiction of the courts to enforce contracts and that of the Board to administer the Act.[11] In determining whether to sanction state and federal courts to enforce no strike commitments by equitable relief, notwithstanding this overlap between the jurisdiction of the Board and that of the courts, this Court must consider and select one of two doctrines which are here antagonistic to each other. On the one hand is the doctrine of preemption, which was enunciated by this

10. This Court's decision in *Boys Market, supra,* lends significant support to the Chamber's position, when this Court sanctions injunctive relief where the agreement contained an arbitration process or a "mandatory grievance adjustment" procedure, p. 253.

11. *Boys Market* apparently did not involve this circumstance.

Court in *Garmon*.[12] That case held that when activity is either arguably protected or arguably prohibited by the Act, "the states as well as the federal courts must defer to the exclusive competence of the N. L. R. B. if the danger of state interference with national policy is to be averted." (at 245.) The rationale for the *Garmon* rule is the presumed utility of obtaining decisional uniformity in labor controversies by securing an initial decision from the N. L. R. B. on factual or policy issues assigned by Congress to that agency's supposed expertise.[13]

Balanced against *Garmon* is a competing doctrine embodied in Section 301. This doctrine advocates using judicial power to enforce collective bargaining agreements. The purpose of Section 301 was to augment the forums available for the enforcement of these agreements; that is, to supplement the existing state forums with the federal courts.[14] Underlying this doctrine was the congressional determination to promote the cause of industrial peace through betterment of the collective bargaining process. To this end it was paramount that both partners in the collective contract have confidence that the terms of the contract they negotiated could be easily enforced. Section 301, then, is a reflection of congressional awareness that

12. *San Diego Building Trades Council* v. *Garmon, supra.* Here a union picketed an employer in an effort to pursuade customers to cease doing business with him. The lower court held that the purpose of the picketing was to compel the employer to sign a union shop contract, though a majority of his employees had not selected the union as their representative. That court enjoined the picketing and awarded damages. This Court refused to permit either the equitable or the compensatory relief on the grounds that the issues raised by the picketing were within the exclusive competence of the N. L. R. B.

13. The preemption of state power to establish substantive rules of law which might conflict with the Act produced the corollary of exclusive N. L. R. B. jurisdiction, in order that other tribunals, while attempting to enforce Federal substantive rights, would not inadvertently misapply them. *Garner, et al.* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776(AFL), et al.*, 346 U. S. 485 (1953). Sovern, *Section 301 and The Primary Jurisdiction of the N. L. R. B.*, 76 Harv. L. Rev. 529, 546 (1962-63).

14. *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962).

there must be accessable forums and facile methods to enforce collective contracts if the bargaining procedure is to enjoy the full confidence of its participants.

The policies underlying *Garmon* and Section 301 could not coexist without one being impared in situations where a party opposes judicial enforcement of a collective agreement on the ground that the conduct alleged to have breached that argument is also arguably within the N. L. R. B.'s exclusive jurisdiction. An early case which considered which of these doctrines would prevail was *Cameron Iron Works*.[15] There an employer discharged several of his employees who had participated in a strike. When the union sued under Section 301 to enforce the arbitration provisions on its contract, the employer responded by urging that the N. L. R. B. had exclusive jurisdiction to try the case in as much as the discharges were arguably violations of the Act. The court rejected this defense. After observing that it is "commonly known" that the Board's decisions "are slow in forthcoming" the court stated:

> "Certainly, if an otherwise arbitrable controversy happens also to be an unfair labor practice, the parties should not be forced to abandon their contract right and be relegated 'to the slow and creaking procedure which, like a wounded snake, has dragged its slow length along, sans bargaining, sans labor peace, sans everything but pride of opinion, illtemper and frustration.' . . . Enforcement of a contract to arbitrate grievances is different from an adjudication of an unfair labor practice by the National Labor Relations Board . . . [the *Lincoln Mills* case] did establish two broad principles: first, that the United States district courts have the unequivocal statutory power to decree specific performance of collective bargaining contracts to arbitrate; and, second, that private arbitration in the labor-management field is to be afforded broad liberties." at page 531-532.

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15. *Lodge 12, International Association of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 467 (CA 5, 1958) cert. denied 358 U. S. 880 (1958).

The Court then held that a court could enforce the contract notwithstanding that the same conduct constituted both an unfair labor practice and a breach of the contract's arbitration provisions. Before this Court was required to address this issue, other lower courts also were holding that courts could not be ousted of their jurisdiction to adjudge a cause under Section 301(a) merely because the activity, if proven, constituted both a contract breach and an unfair labor practice.[16]

It was not long, however, before this Court confronted the clash which arose when the restrictions of *Garmon* abutted the privileges bestowed by Section 301. In *Lucas*,[17] *Dowd*[18] and *Smith*,[19] this court addressed itself to balancing the competing policies which underlay these two doctrines and to formulating a rule which would implement the desires of Congress in the area of collective bargaining. In *Lucas*, a labor organization struck to compel the employer to reinstate an employee who had been discharged because of his unsatisfactory performance. The employer alleged that the strike violated the collective bargaining contract in effect between him and the striking union, and sought damages under Section 301(a) for business losses caused by the strike. *Dowd* presented a situation where the employer reneged on an agreement to institute changes in employment conditions and the union sued for damages in conformity with the wage provisions of the contract. In *Smith*, the employer had discriminated against several employees because of their union membership and these employees brought a damage action against him for violating his contract's ban against discrimination because of an employee's union activity. In each of these three cases the

16. See *Independent Petroleum Workers, etc.* v. *ESSO Standard Oil Co.*, 235 F. 2d 401 (CA 3, 1956); *Textile Workers* v. *Arista Mills Co.*, 193 F. 2d 529 (CA 4, 1951); *Cuneo Press Inc.* v. *Kokomo Paper Handlers' Union No. 34, et al.*, 235 F. 2d 108 (CA 7, 1956).

17. *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95 (1962).

18. *Charles Dowd Box Co.* v. *Courtney, supra.*

19. *Smith* v. *Evening News Association*, 371 U. S. 195 (1962).

cause was brought in a state court. In each, the defendant urged that the conduct which constituted the breach of contract also was arguably protected (*Lucas*) or prohibited[20] (*Dowd* and *Smith*) by the Act and, therefore, the entire case was within the exclusive jurisdiction of the Board.

This Court, however, responded to this contention and held that state courts may adjudicate upon any claim for damages brought under Section 301 for breach of contract even though the conduct involved makes out not only a violation of the contract but also an unfair labor practice.[21]

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20. The strike in *Lucas* was at least arguably protected by the Act in as much as the union denied that its work stoppage violated its collective bargaining agreement. In addition, in its Petition for Writ of Certiorari page 11, the Union urged that the strike was arguably an unfair labor practice and that for this additional reason the state court lacked jurisdiction to determine the union's liability based upon tort. In *Dowd* the employer's conduct amounted to an unlawful refusal to bargain, and the employer so acknowledged in his brief to this Court. Sovern, *Section 301 and the Primary Jurisdiction of the N. L. R. B., supra* at 536, 537.

21. *Lucas* indicates that this Court was considering conduct which violated the Act while also violating a collective bargaining agreement. In n. 9, page 101, this Court stated:

> "Since this was a suit for violation of a collective bargaining contract within the purview of Section 301(a) of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant. . . . Congress 'deliberately chose to leave the enforcement of collective agreements "to the usual processes of the law," ' . . . It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N. L. R. B. to remedy unfair labor practices, as such." (Citations omitted.)

Moreover, four of the five cases favorably cited in that footnote, including *Cameron Iron Works, supra* and *ESSO Standard Oil Co., supra,* dealt with a situation where the courts held that they could not be ousted of their jurisdiction to hear and determine the cases merely because the actions complained of constituted not only a breach of contract but also arguable unfair labor practices. See

[Continued on next page]

In these decisions this Court did not explicate its reasons for its conclusions. However, it appears that particularly in *Lucas* this Court recognized that parties will bind themselves to the obligations of arbitration, and thereby further the Congressional policy favoring this process only if collective bargaining agreements may be judicially enforced, without administrative delay, against those who choose to utilize self-help rather than the agreed upon arbitral procedures. This Court also apparently reasoned that the application of the *Garmon* doctrine to Section 301 suits would seriously hinder the necessary expeditious enforcement since courts would be ousted of their traditional powers[22] to remedy contract violations at least until the Board

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also Sovern, *Section 301 and the Primary Jurisdiction of the N. L. R. B., supra* at 538.

Smith v. *Evening News* explicitly held that:

> "*Lucas Flour* and *Dowd Box*, as well as the later *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 50 LRRM 2433, were suits upon collective bargaining contracts brought or held to arise under Section 301 of the Labor Management Relations Act and in these cases the jurisdiction of the courts was sustained although it was seriously urged that the conduct involved was arguably protected or prohibited by the Labor Management Relations Act and therefore within the exclusive jurisdiction of the National Labor Relations Board. In *Lucas Flour* as well as in *Atkinson* the Court expressly refused to apply the pre-emption doctrine of the *Garmon* case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301." (Footnotes omitted.) At page 197.

These principles have been expressly reaffirmed in *Amalgamated Association of Street, Electric Railway and Motorcoach Employees* v. *Lockridge*, 403 U. S. 274 (1971). This Court there observed that state courts retained concurrent jurisdiction with the Board to entertain claims where the conduct alleged was arguably protected or prohibited by the Act and constituted a breach of contract.

22. This Court also recognized that in 301 actions state and federal courts must only interpret the collective bargaining agreement and not the Board's rules on protected or prohibited activity. That is, the courts must decide not whether particular activity is

determined its own jurisdiction over the conduct which was alleged to have breached the collective bargaining agreement and to have violated the Act.[23]

While *Lucas, Dowd,* and *Smith* involved damage actions, the policy reasons disfavoring the importation of the *Garmon* rule to the 301 area are equally compelling when an aggrieved party seeks equitable relief from a strike which violates his collective bargaining agreement. This Court's recognition that state courts can give injunctive relief coupled with the recent sanction to federal courts to grant this relief reflects the judgment that a "prompt preventive remedy" for contract violations is essential to the national labor policy favoring arbitration. It is the ready availability of injunctive relief to curtail a strike in violation of the agreement rather than the possibility of damages after a labor dispute is settled that is the real and necessary incentive to employers to enter into commitments to submit these disputes to

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arguably protected or prohibited but rather whether a no strike pledge in a collective bargaining agreement was intended by the parties to preclude resort to self-help. Consequently, the traditionally recognized judicial competence to make these contractual decisions may be preserved even though statutory as well as contract issues are raised by conduct alleged to have violated an agreement's no strike clause; courts may dispose of Section 301 actions by preventive or compensatory relief without waiting for the Board to determine if particular activity is protected or prohibited by the Act. The Board would not be bound by the court's decision and, though discordant court and Board decisions might occasionally result if the Board believes previously enjoined conduct is protected, the recognized emphasis on arbitration as a means to settle contractual disputes and the resultant necessity for speedy enforcement of no strike pledges justifies this risk. Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations,* 59 Colum. L. Rev. 269 at 288 (1959).

23. Virtually every suit to enforce a no strike pledge will involve issues of whether the activity is arguably protected or prohibited by the Act. A union may acknowledge that it committed an unfair labor practice and assert the preemption defense, or may contend that its strike does not violate the contract because *e.g.,* it responds to an unfair labor practice by the employer. If the strike is not prohibited by the contract it would be normally protected by the Act. Sovern, *Section 301 and the Primary Jurisdiction of the N. L. R. B. supra* at 536.

the peaceful processes of arbitration. Indeed, an employer's losses after an illegal strike are difficult to calculate because his damages will likely include not only production or distribution losses but also the incalculable loss of customer good will due to the strike caused inability to meet business commitments.[24] If due to concern for decisional uniformity the *Garmon* principle is applied when a party turns to a court for injunctive relief from a contract breach, the delays inherent in the Board's machinery will be imported into the courts. Labor organizations that have breached no strike commitments can defend their action by asserting that the strike is protected or prohibited by the Act.[25] If the courts are then required to refrain from exercising their power to grant equitable relief until the Board has first passed on these contentions, the power to grant such relief is for all practical purposes rendered nugatory due to the unavoidable Board delays, and the employer's incentive to enter into arbitration agreements is necessarily deadened; the Congressional policy favoring the voluntary establishment of arbitration procedures for the resolution of labor disputes is thereby frustrated.

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24. As this Court recognized in *Gateway Coal Company, supra*:

> "[A]n award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strikes and delay an early resolution of the difficulties between employer and union." Note 14, quoting *Boys Market, supra*, 398 U. S. at 248. (85 LRRM at 2054)

Professor Cox's observations are to the same effect:

> "An injunction is the only practical relief against a strike. Damages are inadequate because the injury to the business cannot be measured accurately. Furthermore, an employer can rarely afford to exacerbate labor-management relations by suing a union made up of his employees after the end of the strike." Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt. L. Rev. 247, 255 (1958).

The foregoing assumes that the striking union has adequate funds to pay a judgment. Too often the union's coffers are insufficient to meet the judgment against them.

25. See Note 20 *supra*.

2. Preemption Has Yielded to Policies of Superior Importance in Situations Other Than Those Arising Under Section 301.

(a) This Court and Congress Have Required Preemption to Yield to More Pressing Problems.

The *Garmon* rules are not a "complete and self-sufficient test of federal preemption . . ."[26] and the courts and Congress have demonstrated a willingness to sacrifice the principle of exclusive Board jurisdiction when its application would frustrate other more important policies.[27] There are manifold circumstances in addition to damage claims under Section 301 in which the activity is arguably within the scope of the Act but, nevertheless, courts or tribunals other than the Board may assert initial jurisdiction.

Congress has mandated a significant exception to the exclusivity of N. L. R. B. jurisdiction when it enacted Section 303 of the Act.[28] By this section's provisions the enforcement of cases involving the extremely complex concepts embedded in work assignment disputes (such as the dispute involved in this

26. Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1364 (1972).

27. Sovern, *Section 301 and the Primary Jurisdiction of the N. L. R. B., supra* at 550.

28. "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover damages by him sustained and the cost of the suit." 61 Stat. 158 (1947), 29 U. S. C. Section 187 (1958), as amended, 73 Stat. 545 (1959), 29 U. S. C. Section 187 (Supp. I, 1962).

proceeding) and secondary boycotts is initially entrusted to the competence of the courts.[29]

In addition to Section 303, Congress recognized that it was desirable to further delimit *Garmon* by amending Section 14 of the Act. With this amendment state courts and agencies may "assert jurisdiction over any labor dispute . . .[if] the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of [the Board's] jurisdiction . . ."[30]

Beyond the Congressionally created limits to the *Garmon* doctrine, this Court has recognized that state tribunals may assert initial jurisdiction over matters which compellingly concern them notwithstanding that these matters are at least arguably embraced by the terms of the Act. For example, states have been permitted to grant injunctive relief[31] or award compensatory or punitive damages[32] to remedy tortious conduct including libel,[33] violence,[34] and obstructive[35] or mass picketing.[36] While it is possible that the nature and quantity of evidence a plaintiff must produce to sustain his case will differ from state to state, the "interest in uniformity is subordinated to the

29. In 1959 when Congress expanded the scope of Section 8(b)(4) of the Act, it also expanded 303 (29 U. S. C. Section 158, 1959) despite the fact that inconsistent decisions by the Board and a court had been made. Compare *N. L. R. B.* v. *Deena Artware, Inc.*, 198 F. 2d 645 (CA 6, 1952) cert. denied, 345 U. S. 906 (1953), with *United Brick and Clay Workers* v. *Deena, Artware, Inc.*, 198 F. 2d 637 (CA 6, 1952) cert. denied, 344 U. S. 897 (1952). Sovern, *Section 301 and The Primary Jurisdiction of the N. L. R. B., supra* at 549-550.

30. 29 U. S. C. Section 164.

31. *International Union, U. A. W.* v. *Wisconsin Employment Relations Board*, 351 U. S. 266 (1956), *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223 (1970).

32. *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954).

33. *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966).

34. *United Automobile Workers* v. *Russell*, 356 U. S. 634 (1958).

35. *Taggart* v. *Weinacker's, Inc., supra.*

36. *Electrical Workers* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942).

larger interests" that persons injured by such conduct may enjoy whatever remedies state law may authorize.[37]

In addition, this Court has permitted an individual to press his claim of unfair representation against his union[38] in a state court, through a union's breach of its duty to fairly represent employees in its bargaining unit has been held to be an unfair labor practice by the Board.[39] While application of *Garmon* would have required dismissal of that employee's suit, this Court refused to employ the preemption doctrine. Although one reason for rejecting preemption was that the duty of fair representation had been judicially developed, this Court was also concerned that the N. L. R. B.'s preoccupation for the public interest could deny the aggrieved individual an impartial review of his complaint.

The cumulative effect of the foregoing is that the jurisdiction of one forum, here the state court, is not "displaced simply because the Board also has jurisdiction to act."[40] The preemption doctrine has succumbed to policies more pressing, such as fostering the arbitral process.

(b) The N. L. R. B. Has Voluntarily Yielded Its Jurisdiction to Further the Policy Favoring Arbitration.

In addition to Congressional and judicial inroads to the preemption policy, the Board itself has willingly yielded its jurisdiction to an arbitrator both by deferring to prospective arbitration and by refraining from overturning arbitration awards. In its *Collyer*[41] decision and opinions following upon that case, the

37. *Amalgamated Association of Street, Electric Railway and Motorcoach Employees of America, etc., et al.* v. *Lockridge, supra* dissenting opinion of Justice White at page 318.

38. *Vaca* v. *Sipes,* 386 U. S. 171 (1967).

39. *Miranda Fuel Co.,* 140 NLRB 181 (1962).

40. *Amalgamated Association of Street, Electric Railway and Motorcoach Employees of America, etc., et al.* v. *Lockridge, supra,* dissenting opinion of Justice White at page 313.

41. *Collyer Insulated Wire,* 192 NLRB No. 150 (1971).

Board has held that deferral of issues involved in an unfair labor practice charge to prospective arbitration is warranted when it is reasonably probable that the issues raised by the charge could be resolved under the contract's arbitral procedures. Thus, in *Collyer* the Board relinquished its jurisdiction because the unfair labor practice and arbitration issues both turned on the meaning of disputed contract provisions. Moreover, *Collyer* has spawned decisions which demonstrate that the Board has expanded the category of cases which may be deferred to prospective arbitration. In *National Radio Co.*[42] an allegation of unlawful discharge was deferred though the Board acknowledged that the justification for deferral did not "rest on any presumed primacy of an arbitrator to interpret an ambiguous or contested contract provision". Nonetheless, the Board held that arbitration under the contractual provision prohibiting discipline for other than "just cause" would lead to a resolution of the dispute "which will not be 'repugnant to the purpose and policies of the Act' ". In the words of the Board:

> "[A]n asserted wrong is remediable in both a statutory and a contractual forum. Both jurisdictions exist by virtue of congressional action, *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, . . . and our duty to serve the objectives of Congress requires that we seek a rational accommodation within that duality. We may not abdicate our statutory duty to prevent and remedy unfair labor practices. Yet, once an exclusive agent has been chosen by employees to represent them, we are charged with a duty fully to protect the structure of collective representation and the freedom of the parties to establish and maintain an effective and productive relationship . . . We are . . . adjuring the parties to seek resolution of their dispute under the provisions of their own contract and thus fostering both the collective relationship and the Federal policy favoring voluntary arbitration and dispute settlement."[43]

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42. 198 NLRB No. 1.

43. In *Eastman Broadcasting Co.*, 199 NLRB No. 58 (1972), the Board restated its *Collyer* rule and held that it will defer to prospective arbitration when:

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In addition to abstaining in favor of prospective arbitration, the Board has yielded to arbitration awards based upon activity which is also alleged to be an unfair labor practice, in order to comply with the policy favoring the settlement of disputes through the machinery of arbitration. The Board has stated:

> "If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act."[44]

Thus, in order to contribute to the furtherance of the federal policy favoring voluntary arbitration and dispute settlement, the Board, itself, has voluntarily relinquished its primary jurisdiction to the arbitral process adjuring the parties to resolve their disputes under the provisions of their contract. The identical policy considerations require this Court to permit state and lower federal courts to assert initial jurisdiction over a party's claim for *equitable* relief under Section 301, notwithstanding the fact that the claim may give rise to issues that are protected or prohibited by the Act. If instead of according initial jurisdiction to the

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> "(1) the disputed issues are, in fact, issues susceptible of resolution under the operation of the grievance machinery agreed to by the parties, and (2) there is no reason for us to believe that use of that machinery by the parties could not or would not resolve such issues in a manner compatible with the purposes of the Act."

In *The Associated Press*, 199 NLRB No. 168 (1972) the unfair labor practices deferred for prospective arbitration under the *Collyer* doctrine included allegations that Sections 8(a)(2) and 8(b)(2) had been violated.

44. *International Harvester*, 138 NLRB 923, 927 (1962).

courts, *Garmon* is applied, the parties are deprived of a forum for the expeditious enforcement of no strike pledges;[45] the existence of such a forum is essential if agreements containing arbitration provisions are to be negotiated and thereafter respected.[46]

3. The Policy of Preemption Should Be Reexamined.

The experience of this Court since *Garmon* warrants a reevaluation of that decision. Since, or in spite of, *Garmon* parties have been encouraged by this Court, by Congress and by the Board, itself, to seek other forums if the activities which constitute an unfair labor practice violate the collective bargaining agreement, arise in an arbitrable dispute, or otherwise qualify as one of the exceptions mentioned above. Furthermore, courts have developed increasing expertise in dealing with matters that constitute unfair labor practices. In addition, *Garmon* unhappily fails to distinguish between activity which is arguably prohibited and activity which is arguably protected by the Act. For the latter, there is no provision for an initial decision by the Board. The *Garmon* doctrine, nonetheless, preempts other tribunals.[47]

45. For example see *Cameron Iron Workers, supra.*

46. In *Von Hoffman* v. *City of Quincy*, 71 U. S. (4 Wall.) 535 (1866), Judge Swain observed:

> "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion." at 552.

47. In the words of Deputy Associate General Counsel Come,

> "[A]pplication of the Garmon arguably protected test in this situation leaves the employer's interests in an unsatisfactory condition. The employer cannot obtain relief from the state court with respect to activity that may in fact not be protected by section 7 of the Act, and the only way that he can obtain a Board determination of that question is by resorting to self-help measures; if he guesses wrong, this may subject him not only to a Board remedy but also to tort suits. The result is as

In view of these considerations, the Chamber urges the Court to reconsider whether it is still practical to apply the principles of *Garmon* in areas where there is an actual or potential overlap between the jurisdiction of the courts and that of the N. L. R. B.[48]

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undesirable as the 'noman's land' created by the holding in Guss. . . ." (Footnotes omitted). Come, Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon, 56 Va. L. Rev. 1435, 1444 (1970).

See also the dissenting opinion of Justice White in *Amalgamated Association of Street, Electric Railway and Motorcoach Employees of America, etc., et al.* v. *Lockridge, supra,* pp. 326-328.

48. In a recent article, Professor Cox refers to *Taggart* v. *Weinacker's, Inc., supra,* as an example of the high price employers must pay if the principles of *Garmon* continue to be applied. In *Weinacker's* a union picketed on the employer's property. A state court enjoined this picketing, at least partly because the pickets were trespassers. Had *Garmon* been applied, the state action would have been dismissed immediately because the picketing was at least arguably protected by the Act. However, the ouster of state court jurisdiction would have resulted in a complete denial of legal or equitable remedies to the employer; the employer could not secure a timely ruling from the Board on whether the picketing was protected or not; there was no hope of securing Board relief. Only if the employer precipitated litigation by punishing the picketers and if the union or employees then filed unfair labor practice charges, could the employer secure a Board ruling which would then be too late to be of any use. According to Cox, the cost of denying an employer relief in such situations is an "extraordinarily heavy price to pay in order to avoid the danger that state tribunals may sometimes err . . . " by granting relief in situations where relief would be barred by the Act. In Cox's words,

> "The short of the matter, therefore, is that in order to avoid the risk of a state court misinterpretation or misfinding, the 'arguably protected' rule shuts the door to determination of the question, and thus denies the hope of remedy for what might well turn out to be a substantive wrong. In effect, it denies the employer a day in court." Cox, *Labor Law Pre-emption Revisited, supra,* 1363, 1360-1363.

In an effort to remove the roadblock to an employer's rights in the situation discussed by Cox and Deputy Associate General Counsel Come (footnote 47), the Board would do well to abstain from asserting jurisdiction in cases where picketing or other conduct, while arguably protected by the Act, nonetheless violates state laws such as trespass. Such abstentian would be little different than deferring to arbitration inasmuch as the state courts have a recognized expertise to deal with matters of state concern. See, for example, *Scott Hudgens* v. *N. L. R. B.* (Civil No. 73-3264, CA 5).

4. Courts Must Be Permitted Under Section 301 to Enjoin Strikes Over Work Assignment Disputes, Even Though Issues Raised by These Strikes Come Within the N. L. R. B.'s Jurisdiction.

While a refusal to apply the policy of preemption to arbitral disputes will generally further the preeminent policy favoring peaceful and voluntary settlement of industrial disputes, it is particularly appropriate in the present case involving a jurisdictional or work assignment dispute to permit the state court to promptly enjoin the illegal strike though a violation of the Act is also arguably involved.

The Act, in Section 10(k) (29 U. S. C. 160(k)), establishes a special procedure dealing with jurisdictional disputes:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

The Board has expressly understood Section 10(k) to deprive it of jurisdiction in such cases. In *Laborers, Local 423*,[49] the Board said:

> "However, the thrust of Section 10(k) of the Act is to forbid the Board to settle the jurisdictional dispute only upon a showing of a method agreed upon by the parties of settling the dispute, . . .
>
> If we retained jurisdiction in this case, the statutory purpose to encourage the voluntary settlement of jurisdic-

49. 199 NLRB No. 48 (1972).

> tional disputes would be frustrated in that a party receiving an adverse decision from the agreed-upon tribunal for settling its jurisdictional dispute would be encouraged to ignore such decision, lapse into noncompliance, and then come before this Board for a more favorable resolution of the dispute."

In addition, this Court has observed that "the Board, as admonished by Section 10(k), has often given effect to private agreements to settle disputes of this character; and that is in accord with the purpose . . . 'that full opportunity is given the parties to reach a voluntary accommodation without governmental intervention if they so desire.' "[50] Inasmuch as the facts of this case demonstrate that the parties have agreed upon a method of settling their jurisdictional dispute, the Board by its own decisional policy has deprived itself of further jurisdiction. Permitting the state court to enforce the collective bargaining agreement by initially enjoining the work stoppage in breach thereof is in accord not only with the basic national labor policy but also with the decisional policies of the National Labor Relations Board itself.

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50. *Carey* v. *Westinghouse Electric Corp.*, *supra* at pages 264-265 footnote and citations omitted.

CONCLUSION.

For the foregoing reasons, it is respectfully urged that the Decision and Order of the Supreme Court of Florida be reversed.

Respectfully submitted,

MILTON SMITH,
General Counsel,
RICHARD BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.
Washington, D. C.

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
JERRY KRONENBERG,
JULIAN D. SCHREIBER,
Borovsky, Ehrlich & Kronenberg,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.

Of Counsel:
COLE, ZYLSTRA & RAYWID,
2011 Eye Street, N. W.,
Washington, D. C. 20006.